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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1307

NAVAJO FREIGHT LINES, INC., a corporation,

Petitioner,

vs.

VACCO INDUSTRIES, a California corporation

Respondent.

REPLY BRIEF.

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Under Rule 24(4) of the Supreme Court Rules, Reply Briefs directed to arguments first raised in the Briefs in Opposition may be filed. Accordingly, the comments in this brief will be restricted to arguments first raised in the Brief in Opposition hereinbefore filed by respondent.

Respondent first complains that no showing or argument in support thereof is made for invoking the jurisdiction of the Supreme Court under 28 USC 1257(3). In the Petition itself, immediately after the statement is made that said section confers jurisdiction, reference is made to the Carmack Amendment to the Interstate Commerce Act as the statute of the United States determining the rights of the parties. Since the determination of the lawsuit involved a determination of the rights of the parties under the Carmack Amendment, jurisdiction of the Supreme Court of the United States to review that decision arises.

On page 3 of the Brief in Opposition, respondent states the point that because the decision of the state court is not contrary to the decision of the Supreme Court, the Supreme Court ought not to take jurisdiction. Respondent's view finds no support in Rule 19, Supreme Court Rules, under paragraph 1. Subparagraph (a) of Rule 19 supports the granting of the Writ when the state court has decided a federal question of substance not theretofore determined by the Supreme Court, or has decided it in a way probably not in accord with applicable decisions of the Supreme Court. Reference to the questions presented in the Petition reflect questions on interstate commerce not previously decided by the Supreme Court of the United States.

Respondent's attempt, commencing at page 4, to show that the lower court decision in this case is based on matters of peculiarly local concern is not appropriate to the facts of this case. The cases cited by respondent at pages 4 and 5 of the Brief in Opposition with one exception were decided under the law of the state involved, under a state statute initially and the questions arose whether the petitioner's rights therein under the Federal Constitution or statute were sufficiently involved to give the Supreme Court the right to review. Those cases are not this case. The exception is the case *Buck v. California,* (1952) 343 U.S. 99, 96 L.Ed. 775. This case involved a San Diego County ordinance regulating taxicabs carrying passengers from Mexico to San Diego requiring a written application for a permit, payment of a $1 fee, and compliance with certain standards relating to the public safety. The court said that though Congress had partially excluded taxicabs from regulation and had provided minimum regulation over taxicabs, the state could,

in the exercise of its police power, provide additional consistent regulations which will stand together with those enacted by Congress. This is a different type of regulation than is involved in the mainstream of interstate freight shipments, a field which Congress has preempted. *Hangar v. Allied Van Lines, Inc.,* (1964) 203 A.2d 420.

Congress derives its powers to regulate interstate commerce from the Constitution of the United States which in Article 1, Section 8, clause 3 provides that Congress shall have power to regulate commerce . . . among the several states. . . . This has been interpreted to give Congress exclusive power to regulate commerce except for non-discriminatory regulation by the states in the nature of the exercise of police power or taxing power of a nature that does not constitute a burden on interstate commerce.

The Carmack Amendment to the Interstate Commerce Act and the remainder of the Interstate Commerce Act reflect the intention of Congress to preempt by federal legislation the field of interstate commerce. The state court system, in determining the rights of the parties to this lawsuit under the Federal Statute, acted as a court system having concurrent jurisdiction with the federal courts in construing the rights of said parties created by federal statute. There is no right of peculiarly local concern involved in this case, except the procedural rights involved in any determination in the state court system.

Reference is made in the Brief in Opposition at page 16 thereof to the testimony of Charles Avery, witness for the defendant, Navajo. Said witness testified in effect that the damage to the concerned property

occurred during transit without negligence on the part of the defendant by reason of the fact that such damage was the result of normal handling and normal vibration induced into the cargo from the truckbed, and that the damage occurred because of improper packing by the shipper in that there was no internal bracing of the shipment which would have served as a damping and cushioning agent to absorb and render ineffective the vibration induced into the shipment from the roadbed through the trailer. His testimony did not in any respect support damage by improper handling by the carrier but rather fully supported damage as the result of improper packaging by the shipper. Such testimony ought not to be available to the respondent to establish its *prima facie* case, yet, under California statutes such testimony by defense experts, even when it is opinion evidence only, is not only discoverable, but in this case was used to establish respondent's *prima facie* case that the shipment was damaged in transit before delivery to the consignee even though there was no other evidence, apart from opinion evidence, that the shipment was actually damaged at the time of delivery. Damage in transit which occurs as the result of the shipper's improper packing of the shipment is not a basis for judgment against the carrier.

A declaration of value stated on the face of the bill of lading, as it was in this case, does not put the carrier on notice that special damages will result to the shipper if the shipment is damaged in transit.

Mr. Tolley, of respondent, stated that the declaration of value of $130,000.00 for the shipment was typed on the bill of lading to avoid the settlement by the carrier of a claim for damage by respondent at the rate of 10c per pound [Rep. Tr., Vol. II, p. 369,

lines 9-16]. Respondent was thus under the mistaken belief that the carrier would endeavor to settle its claim for damages in transit, if carrier damage occurred, at a maximum amount of $1,100.00 if the declaration had not been put on the bill of lading, based on a total weight of 11,000 pounds.

Declarations of value on a bill of lading serve only one purpose. If the declaration is low enough and if the carrier provides in its tariffs a lower rate based on the lower declaration of value, then the shipper is entitled to the lower freight rate. If a declaration of value is placed on a bill of lading in which there is no special rate based upon the declared value of the shipment, the declaration is surplusage and is ignored by the carrier in handling the shipment. Damages which a shipper is entitled to recover if a shipment is damaged in transit as a result of carrier negligence result from other aspects of a carrier-shipper relationship than the declared value stated on the bill of lading. The maximum amounts for which the shipper may recover are those which were within the contemplation of the parties at the time they entered into the original bill of lading. *F. J. McCarthy Co., Inc. v. Southern Pacific Co.*, (1970) 428 F.2d 690, at page 693.

Of the items claimed in this case by the shipper only direct costs of approximately $14,000.00 and a reasonable amount of overhead, only an amount approximating an additional $2,000.00, so qualify. Approximately $32,000.00 of overhead and prejudgment interest thereon does not so qualify. They were special damages and should have been classified as such as a matter of law.

Conclusion.

Petitioner prays that the Writ of Certiorari issue.

Respectfully submitted,

ALFRED D. FREIS,

Attorney for Petitioner,